Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Over 75 years of Iowa Civil Procedure jurisprudence requires the service of an original notice (summons) before the court obtains jurisdiction. The Eighth Circuit has sanctioned an *ex parte* replevin without the service of an original notice. Can the Eighth Circuit's opinion stand in conflict with 75 years of Iowa Civil Procedure?

The Iowa replevin statute prior to *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), was in many respects identical to that of the Pennsylvania and Florida statutes struck down. The Iowa Supreme Court struck down the Iowa replevin statute for want of notice in 1972 in *Thorpe Credit, Inc. v. Barr*, 200 N.W.2d 535 (1972). In response, the Iowa legislature amended the replevin statute, unequivocally stating that the new act requires notice. The question is whether the Eighth Circuit's sanction of the application of an *ex parte* replevin writ conflicts with the decisions of the Iowa Supreme Court and the legislature of the State of Iowa.

Does the Iowa replevin statute pass constitutional muster under the Fourteenth Amendment where:

A. It has been interpreted to allow *ex parte* proceedings;

B. There is no provision for prompt post-deprivation hearing;

C. The replevin defendant cannot post bond after the turnover;

D. The replevin plaintiff can dismiss his case after an *ex parte* seizure, turnover of property and where the court loses jurisdiction vitiating any post deprivation protections afforded the replevin defendant; and

E. Does the Eighth Circuit sanctioning of such a statute conflict with the opinions of this Court in the line of cases from *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969), through *North Georgia Finishing Company v. Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975).

LIST OF PARTIES

Roger Hoffman, a defendant below, was dismissed in the district court.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Audio Odyssey, Ltd., states that it is an Iowa corporation in good standing with no corporate parents or affiliates, that it has no publicly traded stock, that Dogan Dincer is the sole shareholder and therefore no publicly held company owns any of Audio Odyssey, Ltd.'s stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

Prior to the filing of the case in the United States District Court for the Southern District of Iowa, the Iowa District Court in and for Scott County, case No. 88314, entered several orders including: the Replevin Order dated July 14, 1995; an Order denying a Motion to Dismiss dated August 16, 1995; a handwritten Order allowing access to real estate dated August 31, 1995; an Order denying replevin plaintiff's Motion for Adjudication of Law Points dated March 29, 1996; an Order denying the replevin plaintiff's Motion to Continue Trial dated August 10, 1999; and an Order dismissing replevin entered on September 7, 1999 after replevin plaintiff's Rule 215 unilateral dismissal. (The orders above can be found in the Lodging).

The district court's opinion (per Longstaff, D.J.) dated October 13, 1999, granted summary judgment to defendants Hoffman/Anderson and Nelson and Scott County, defendants. On January 21, 2000 the court granted summary judgment to the Bank defendants. The district court's opinions can be found in Appendices C (54a-67a) and D (68a-105a). The Court of Appeals Panel Opinion (per Sachs, District Judge sitting by designation) is published at 245 F.3d 721 (2001) (Appendix B). The Court of Appeals *en banc* judgment dated April 10, 2002, is at 286 F.3d 498 (8th Cir. 2002) (Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeals entered its *en banc* opinion and order on April 10, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of pertinent statutes are 42 U.S.C. § 1983, reprinted in Appendix E at p. 107a. Code of Iowa, Chapter 643, 1973, is attached at Appendix E at pp. 108a-114a. Code of Iowa, Chapter 643, replevin, 1975, is at Appendix E at pp. 115a-121a, and Code of Iowa, Chapter 643 replevin, 1995, is at Appendix E at pp. 122a-129a. The Iowa Rules of Court are attached as Appendix E at pp. 130a-132a. Amendment Four to the Constitution of the United States and Amendment Fourteen to the Constitution of the United States are attached as Appendix E at pp. 106a and 106a, respectively.

STATEMENT OF THE CASE

This case involves a writ of replevin obtained *ex parte* by attorneys for Brenton Bank on July 14, 1995. The writ provided for seizure of inventory and other personal property at Audio Odyssey, an electronics store. However, when Scott County Sheriff Deputies pointed out that the Bank was not prepared with moving vans to take the inventory, the Bank, through its attorney, directed the Sheriff's deputies to seize the real property itself and locked the plaintiffs out of their business, which the deputies did. Plaintiffs were kept from returning to their business for several weeks. No court order ever authorized the seizure of real property.

No original notice was issued by the replevin plaintiffs and served on the replevin defendants until almost one month after the *ex parte* seizure.

Because the seizure was without notice and a pre-deprivation hearing, plaintiffs were deprived of property without due process under the Fourteenth Amendment. 42 U.S.C. § 1983 allows for causes of action whenever plaintiffs are deprived of constitutional rights under color of state law, which clearly occurred here.

While the panel opinion reversed the district court's grant of summary judgment on all counts as to all defendants as far as the Fourth Amendment was concerned, the panel decision let stand the Fourteenth Amendment dismissal on summary judgment. The *en banc* opinion did not disturb the Fourteenth Amendment ruling and found that the Fourth Amendment seizure of real estate was unreasonable with the possible exception of the initial seizure. But 6 weeks was unreasonable.

The district court and both the panel and the *en banc* decisions of the Eighth Circuit resolved all factual disputes against the non-movant in violation of established summary judgment law. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986).

After Dogan Dincer had worked at Audio Odyssey for 14 years, several years as a minority shareholder, he purchased the business in October 1991 for $270,000, partially financed through a $200,000 loan from Brenton Bank, guaranteed by the Small Business Administration (SBA).

On July 13, 1995, Mr. Dincer paid $6,983.00 to Brenton Bank, instructing the teller that the payment was to be applied to the June and July monthly payments on the SBA note. Instead, the Bank applied the payment to an overdraft.[1]

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1. The SBA later required the Bank to apply this payment to the SBA note as Mr. Dincer had instructed. This requirement was a condition of the Bank accepting an 85% guaranty of the Dincer loan from the SBA. Ultimately, the Bank applied the payments to the SBA loan as Dincer had directed.

On Friday, July 14, 1995, John Bradley of the Bank hand delivered to Mr. Dincer at 8:50 a.m. a letter from the law firm defendants demanding that Mr. Dincer pay approximately $127,000 by 9:00 a.m. or within 10 minutes of the demand. Dincer called his attorney, informed Mr. Bradley he could not come up with $127,000 within ten minutes, and around noon that same Friday, Dincer's attorney faxed a letter to the attorneys for the Bank, the Anderson & Nelson law firm, stating that Audio Odyssey was not in default and that the attorney was authorized to accept service. The demanded amount did not include a reduction for the July 13 payment.

With no service on the Dincers' attorney, and no notice to plaintiffs, the Bank's attorney, Bernard Hofmann, filed a Petition in Replevin at 1:44 p.m. on July 14, 1995. At 2:07 p.m., an Iowa District Court Judge entered an Order of Replevin and the Clerk's office issued the Writ of Replevin authorizing the Bank to replevy "all inventory, fixtures, accounts, furniture, equipment, and machinery." Nothing in the Petition, the Writ or Order made any reference to seizing real estate or locking plaintiffs out of their premises.

At approximately 3:15 p.m., Mr. Hofmann delivered the Writ to the Scott County Sheriff's Office and requested that someone serve the Writ immediately. Sergeant Barton of the Sheriff's Office asked Attorney Hofmann if the Bank had trucks lined up to take the inventory.

Hofmann's answer was no. Sergeant Barton explained that replevins usually took several days because of the need to line up the trucks, and to inventory the personal property as it is removed from the premises.

Hofmann called Bradley at the Bank to ask what to do. Bradley said that they should change the locks and lock plaintiffs out. Attorney Hofmann asked Barton if the Sheriff's Department could do that and Sergeant Barton said yes. Hofmann then completed a form entitled, "Directions to Sheriff", which indicated that Bradley would meet the Sheriff's Deputies "at store with a locksmith." Bradley then met the deputy as agreed.

Deputy Sheriff John Norris went to Audio Odyssey, served the Writ and no other documents on Dincer, met Bradley and the locksmith at the premises, and told all customers, employees and Mr. Dincer to leave the premises. Although the Writ provided only for seizure of personal property, the Sheriff seized the real property on which Audio Odyssey rests, gave the keys to the premises and the security system to Brenton Bank representatives, and placed "No Trespassing" signs on the property. They had no authority from the landlord, Frank G. Brown, Jr., to do this.

The signs remained posted after the property was seized until August 31, 1995, despite a certified letter to the Scott County Sheriff sent on August 2, 1995 demanding return of the property. An Original Notice, the summons form used in Iowa, was not issued and served until August 9, 1995. Because the Iowa replevin statute does not provide for a post-deprivation hearing, it was only after the replevin defendant raised procedural and constitutional questions, that the state court entertained an evidentiary hearing, five weeks after the business closing, on August 22, 1995. It was established at that hearing that in fact insurance was in place on July 14, 1995, and that the Bank, in effect, admitted that there was no exigent circumstance justifying the *ex parte* replevin.

The replevin suit was eventually voluntarily dismissed by the Bank in September of 1999 just prior to a jury trial without a judgment and without the evidentiary hearing initially commenced on August 22, 1995 ever having been completed.

On May 16, 1997, plaintiffs filed their Complaint against the Bank defendants and the Scott County defendants, and on July 14, 1997, filed their Complaint against Hofmann and his law firm. By its Orders dated December 15, 1997, the District Court granted the Motion to Dismiss of Roger Hoffman (of the SBA) in case No. 10082, and granted motions by all defendants in both cases to dismiss the claims of Dogan Dincer and Ann Dincer for lack of standing.

After consolidating the cases on plaintiffs' motion on June 30, 1999, on October 13, 1999 the court granted motions for summary judgment by the Hofmann/Anderson & Nelson defendants and the Scott County Defendants. On January 21, 2000, the court granted the Motion for Summary Judgment by the Bank defendants, dismissed the remaining state pendents claims, and entered a final judgment on January 25, 2000. Plaintiffs timely appealed this judgment to the Eighth Circuit on February 23, 2000. The panel decision reversing and remanding was issued on April 6, 2001. Petitioners (plaintiffs/appellants below) filed a Petition for Rehearing by Panel and defendants/appellees/respondents filed Petitions for Rehearing *En Banc* in the Eighth Circuit. Those latter petitions were granted and rehearing argued on September 13, 2001. The Eighth Circuit's *en banc* opinion was issued April 10, 2002. Plaintiffs timely filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE EN BANC DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *FUENTES* AND ITS PROGENY AND THE IOWA SUPREME COURT'S DECISION IN *THORP.*

In 1973 the Iowa General Assembly changed the Iowa Replevin Statute to comply with both *Fuentes* and *Thorp. Id.*[2] The law was enacted the year **before** the *Mitchell* decision. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), is not relevant in the context of interpreting § 643.5. *Fuentes* and *Thorp* are pertinent.

> *Fuentes* held that in the absence of 'extraordinary situations,' a debtor could not be deprived of a significant property interest unless provided with notice and a pre-deprivation opportunity to contest the creditor's claim.

(Panel dec. p. 8). The Supreme Court did not leave the term "extraordinary situation" undefined. The situation must be "truly unusual" and meet three criteria.

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second,

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2. It is of note that in *Fuentes* the Pennsylvania appellants had a post-seizure remedy available to them as did the appellants in *Sniadach. Id.* (*Fuentes* Footnotes 9 & 15) Georgia too had motion procedures available to the plaintiffs in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

> there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. 91. The Court did narrow its holdings in *Mitchell*, but the law in Iowa was changed the year before that decision to comply with *Fuentes* and *Thorp*.[3]

Prior to *Fuentes*, the Iowa replevin statute was "in all material aspects identical" to the Florida statute found unconstitutional in *Fuentes*. In *Thorp* the court found that the holding in *Fuentes* compelled the court ". . . to declare unconstitutional and invalid sections 643.5 and 643.6, the Code for their want of notice and judicial hearing requirements prior to seizure." *Thorp* 536-537. The Iowa Supreme Court has not refined or narrowed its holding.[4]

This case is more akin to those cases depriving a claimant "by virtue of which he was presently entitled to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Lujan, et al. v. G&G Fire Sprinklers, Inc.*, 532 U.S. __ (2001), citing *United States v.*

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3. In *Fuentes*, the Court found that the requirement of a bond and the making of allegations concerning the right to specific goods were ". . . hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in rights." *Id.*

4. Except for the use of gender-biased pronouns, the language used in § 643.5 after the change from the 1973 Code, was the same in 1975 and 1995.

James Daniel Good Real Property, 510 U.S. 43 (1993); *FDIC v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

II.

THE EIGHTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH IOWA RULES OF CIVIL PROCEDURE AND WITH DECISIONS OF THE SUPREME COURT OF THE STATE OF IOWA REQUIRING THE ISSUANCE OF SERVICE OF AN ORIGINAL NOTICE (SUMMONS).

A. Iowa Rules Of Civil Procedure Require Notice To Defendant Prior To The Court Assuming Jurisdiction.

Iowa Code § 643.2 provides that a replevin action shall be tried by "ordinary proceedings", and the Panel found that this term incorporated the Iowa Rules of Civil Procedure. In fact, under Iowa law it is **only** by following these rules that the court can obtain jurisdiction in a civil action. Specifically, compliance with Rule 50 is necessary for a court to obtain personal jurisdiction over a defendant. *Fisher v. Keller Industries*, 485 N.W.2d 626, 628 (Iowa 1992)[5]

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5. On August 4, 1995, Audio Odyssey filed a Motion to Dismiss based on several issues, one of which was that § 643.2 provided that a replevin action was to be by "ordinary proceedings", and the Iowa Rules of Civil Procedure would apply. The motion further detailed that no "Original Notice" had been issued or served, and that Brenton First National Bank had not properly invoked the jurisdiction of the court. Judge de Silva's order in response to Audio Odyssey's Motion to Dismiss does not address the issue of jurisdiction raised in relation to § 643.2. He does state that under § 643.5 notice need not be given.

Rule 50 of the Iowa Rules of Civil Procedure requires that original notice and a copy of the petition be served upon the defendant. The "Original Notice" is the formal writing, issued by authority of law, for purpose of bringing defendants into court to answer plaintiff's demands in a civil action. *Jacobson v. Leap*, 88 N.W.2d 919, 921 (Iowa 1958). It contains specific information, including the amount of time the defendant has to answer. (R.C.P. 49(a)). In the circumstances of this case, defendants would have had twenty days to answer the petition unless the court issued an order prescribing a different amount of time. (R.C.P. 53)

Proof of service must be filed in the clerk's office before action is to be taken by the court. (R.C.P. 82 (g)). This ensures that service was made because ". . . a proper return is ordinarily necessary, and without it the trial court is not authorized to find that it has jurisdiction." *Gray v. Lukowski*, 241 N.W.2d 35, 39 (Iowa 1976).

B. Iowa Courts Steadfastly Require Strict Compliance With Iowa Rules For Jurisdiction To Attach.

The Iowa Supreme Court has consistently found compliance with Rule 50, requiring notice of action is mandatory, jurisdictional and has statutory status. *Fisher v. Keller Industries*, 485 N.W.2d 626, 628 (Iowa 1992); *Marks v. Shinrone, Inc.*, 220 N.W.2d 889, 890 (Iowa 1974); *McArtor v. Pete's Cafe*, 175 N.W.2d 369, 371 (Iowa 1970); *White v. O'Neill*, 164 N.W.2d 79, 80 (Iowa 1969); *Gordon v. Doden*, 154 N.W.2d 146, 147 (Iowa 1967); *Parkhurst v. White*, 118 N.W.2d 47 (Iowa 1962).

In *White v. O'Neill, id.*, defendants, in an action brought for injuries sustained in an automobile accident, challenged

the jurisdiction of the court due to the lack of a salutation clause in the original notice which was required by Rule 50, R.C.P., as it was in effect at that time. The Iowa Supreme Court determined that the lack of a salutation on the original notice was enough of a substantial departure from the Rule, that the court had not acquired jurisdiction. The court said, "There is danger in permitting courts to assume jurisdiction to determine and dispose of the rights of parties, upon notice that is not addressed to the party, and in which he is not distinctly informed that his presence is required to protect his interests." *Id.* 81 This case is indicative of the importance placed upon "Original Notice" in Iowa.

A more recent case, *Committee for Better Government by J. Lowell Simons v. The Honorable Judge Stephen P. Carroll*, Iowa App. 1995 No. 4-400/94-0500, provides even further evidence of the need for strict compliance with the rule requiring proper service of original notice. In that instance the Iowa Court of Appeals affirmed the district court's finding that the defendant had not been served appropriately, and that the plaintiff's action should be dismissed with prejudice. The plaintiff had given notice by publication, and stated he had both mailed notice to the defendant and had given the notice to the deputy clerk of court to give to the defendant. However, these forms of service were found inappropriate. Thus, even though the defendant may have knowledge of a suit against him, this knowledge does not negate the need for original notice as required by rule.

It is a basic principle of our legal system that a Court must have personal jurisdiction over the parties. A Court does not have personal jurisdiction over the parties if they were not served proper notice of the action. *See Holmes v. Polk City Savings Bank*, 278 N.W.2d 32, 34 (Iowa 1979); *City of Oelwein v. Dvorsky*, 380 N.W.2d 739, 741 (Iowa App. 1985).

Thus, in order for the court to obtain jurisdiction under Iowa law, Audio Odyssey would have had to have been served with "Original Notice."

When, as in this case, the defendant challenges the personal jurisdiction of the court, the burden shifts to the plaintiff to sustain the requisite jurisdiction by showing that adequate and timely service has been made. *Dennis v. Christianson*, 482 N.W.2d 448, 450 (Iowa 1992). The Bank could not meet this burden because service of the "Original Notice" did not occur until August 9, 1995, and proof of service was not filed until the next day, August 10. To make matters more confusing, the "Original Notice" that was received on August 9 stated,

> You are further notified that unless, within 20 days after service of this original notice upon you, you serve, and within a reasonable time thereafter file a motion or answer, in the Iowa District Court for Scott County, at the courthouse in Davenport, Iowa, judgment by default will be rendered against you for the relief demanded in the petition.

Since the purpose of a replevin action is to determine who should have possession, *Barry v. State Sur. Co.*, 1967, 261 Iowa 222, 154 N.W.2d 97, and since Judge Havercamp had already issued a Replevin Order on July 14, which gave possession of Audio Odyssey's inventory, fixtures, accounts, furniture, equipment and machinery to the Bank, and thereafter, the Clerk of Court issued a Writ to the Sheriff and the keys "turned over to the bank," the effect was that a judgment had already been rendered against Audio Odyssey.

Under Iowa's Rules of Civil Procedure, on July 14, 1995, Judge Havercamp did not have jurisdiction to issue an order for

seizure of Audio Odyssey's property because no "Original Notice" had been served, nor had a proof of service been filed as required by the Iowa Rules of Civil Procedure in effect on that date. (R.C.P. 48, 49, 50, 53, 82(a), 82(g)).

The failure of jurisdiction demonstrates the unconstitutional application of the statute to these plaintiffs.

III.

THE IOWA REPLEVIN STATUTE REQUIRES NOTICE AND A HEARING BEFORE SEIZURE OF PERSONAL PROPERTY AND A SEIZURE WITHOUT SUCH NOTICE IS UNCONSTITUTIONAL.

The Eighth Circuit's opinion sanctions wholesale seizures without due process and would open up to creditors the means to disenfranchise thousands of debtors in Iowa and elsewhere in the Eighth Circuit.

The Iowa Supreme Court on statutory interpretation:

> When confronted with an issue involving the interpretation of a statute, we begin with the principles of statutory construction. The polestar of statutory interpretation is the intent of the legislature. We seek to ascertain and effectuate the true legislative intent. We must not only examine the language of the statute, but also its underlying purpose and policies, as well as the consequences stemming from different interpretations. In doing so, we must construe the statute in its entirety.

(Internal citations omitted.) *State of Iowa v. Michael Allen Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000).

The court will not construe a statute in a way that would produce "impractical or absurd results." *Mortimer v. Freuhauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993).

Sections 643.2 and 643.5 are the two sections of the Iowa Replevin Statute that determine the necessity and need for notice prior to seizure of personal property pursuant to that statute. Section 643.2 states:

> The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

Section 643.5 states:

> Upon direction of the court after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand, and the seal of the court, directed to the proper officer, requiring the officer to take the property therein described and deliver it to the plaintiff.

The Panel decision determined that "ordinary proceedings" incorporated the Iowa Rules of Civil Procedure. The Panel found Audio Odyssey could have obtained a prompt post-deprivation hearing under I.R.C.P. 100. If, in fact, the Iowa Rules of Civil Procedure had applied, there would have been no need for a post-deprivation hearing because Audio Odyssey would have received notice and an opportunity to be heard before the seizure. The Panel also ignored the implicit finding in *Fuentes*, *id.* that general motion practice is not a substitute for a statute requiring a prompt post-deprivation hearing. See footnote 2, p. 7.

In 1973 the Iowa General Assembly passed an act changing §§ 643.5, 643.6 and 643.7 of the Iowa Replevin Statute. This Act was initiated by the Senate Committee on Judiciary, and Senate File 536 of the 65th General Assembly offers this explanation: "This bill requires a hearing before any property may be seized pursuant to the replevin statutes, to accord with both state and U.S. Supreme Court decisions." Therefore, the words "as it may prescribe" cannot mean no hearing. If those words can't mean no hearing, it would be an "absurd result" for those same words to mean no notice.

The language of § 643.5 further indicates that notice is required before a hearing is held. It states ". . . after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand . . ." It would be impossible to issue the writ **after** a non-event. If there was no notice, the clerk could still issue the writ, but it wouldn't be **after** notice. Therefore, § 643.5 is only reasonably understood if notice is required and the hearing is as prescribed, except the hearing may not be without notice.

The Iowa replevin statute, when read in its entirety, requires both notice and hearing before property may be seized. If, in fact, Judge Havercamp did ask "Hofmann whether the state's replevin statute required notice to the defendant" as the Panel's decision states, he was asking the fox to guard the hen house. To ask opposing counsel what the rights of their adversaries are is an open invitation to an abuse of those rights.

CONCLUSION

When the Iowa replevin statute requires the action to be by ordinary proceedings which incorporates the Iowa Rules of Civil Procedure, these rules have the force and effect of statutes. The rules require notice to the defendant of any action filed against him and an opportunity to respond to the allegations before the court takes any action. When the court issued the Replevin Order on July 14, 1995 that authorized the seizure of Audio Odyssey's personal property, it did so without jurisdiction.

Based on the foregoing, appellants respectfully request that their petition for *certiorari en banc* be granted because the Eighth Circuit's decision changes the replevin law in the state of Iowa, a role constitutionally limited to the legislative branch of government; conflicts with Iowa's Rules of Civil Procedure, the United State Supreme Court's decision in *Fuentes* and the Iowa Supreme Court's decision in *Thorp*. Further, the Panel's decision allows a court to seize personal property without having first obtained personal jurisdiction. Finally, the decision would allow (as in this case) the *ex parte* seizure of goods, the replevin plaintiff's unilateral dismissal of suit under former Rule 215 and discharge of bond before the Original Notice is ever served.

The Appellants respectfully request that Part III of the Panel's decision be vacated; that the Iowa Replevin Statute be found to require notice as outlined in the Iowa Rules of Civil Procedure, and that it be found that the statute was applied unconstitutionally in this case. In the alternative, Appellants respectfully request that this Court find the Iowa replevin scheme unconstitutional.

Respectfully submitted,

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